## Alternatives to layoffs in the Golden State

California law allows salary reductions for exempt employees. The state also has a little-known, but innovative, workshare program

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On August 19, 2009, the Chief Counsel of the Division of Labor Standards Enforcement for the State of California (DLSE) issued an opinion letter analyzing whether the salary basis test for payment of exempt employees precluded an employer from implementing a temporary work schedule and salary reduction in order to avoid or limit the need for layoffs. The DLSE opined that, under both California and federal law, the salary basis test for exempt employees permitted work schedule and salary reductions to avoid layoffs. The DLSE further concluded that "neither the Labor Code and Industrial Welfare Commission wage order provisions, nor the federal law upon which the pertinent provisions of California law is based," prohibit employers from implementing proposed reductions in the work schedule and salary of exempt employees.

The letter was based on an employer who wished to reduce both its non-exempt and exempt employees to a four-day work week, reducing the salary of exempt employees by 20% and not paying the non-exempt employees for that day. Additionally, the employer had previously conducted layoffs and was only pursuing the work schedule and salary reduction because it was experiencing significant economic difficulties due to the present severe economic downturn. The employer intends to restore both the full five-day work schedule and full salaries of its exempt employees as soon as business conditions permit.

## No violation of salary basis test

The salary basis test is set forth in California Labor Code § 515(a) and the applicable wage order and states that an employee must earn a monthly salary equivalent to no less than two times the state minimum wage for full time employment (40 hours per week) in order to satisfy the test. DLSE further explained that it follows the general federal interpretations under the federal Fair Labor Standards Act (FLSA) salary basis test with respect to allowable deductions for absences to the extent there is no inconsistency with specific provisions in the Labor Code or Industrial Welfare Commission Orders. Salary reduction may not reduce the amount paid to the employee to less than the minimum standard required under the applicable law.

The United States Department of Labor (DOL) released a series of opinion letters extending as far back as 1970 in which it consistently concluded that the salary basis test did not preclude a bona fide fixed reduction in the salary of an exempt employee to correspond with a reduction in the normal workweek so long as the reduction is not designed to circumvent the requirement that the employee be paid their full salary in any week in which they perform work. A fixed reduction in salary that becomes effective during a period when a company operates a shortened workweek due to economic conditions was found to be a bona fide reduction that was not designed to circumvent the salary basis payment.

Federal appellate and trial court decisions further support the conclusion that an employer's proposal to reduce its

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exempt employee's work schedule and salary does not violate the salary basis test.

Another alternative: work sharing

The California Employment Development Department's (EDD) work sharing program is an alternative to layoffs that has seen an increase in participation this year. The program was initially a safety net created by California state lawmakers in 1978 to spare workers from total unemployment during economic downturns, and to allow employers to avoid the cost of recruiting, hiring, and training new employees when the economy once again improves. This little-known state program pays partial unemployment benefits for employees whose hours and wages have been cut. Work sharing benefits are funded through payroll taxes, similar to regular unemployment insurance. In order to participate in the program, an employer must complete an application and submit a plan that meets the program's requirements. Among these program requirements is that 10% of the employer's workforce or a unit of that workforce be affected by at least a 10% reduction in wages and work force hours.

The forms must be checked and processed by hand due to the complexity of the application, yet the Employment Development Department, which runs the Work Sharing Unemployment Insurance Program, recently reported that the majority of claims are still paid within seven days of receipt of the application. Once the plan has been approved, the benefits are paid to the participating employees in proportion to the percentage that their hours and wages have been reduced. For example, when an employee's wages and hours are cut by 20%, or one day a week, the employee's work sharing benefits would be 20% of the unemployment insurance benefits that they would have received had they been unemployed. The maximum unemployment benefit for an individual who is unemployed is \$450 per week. BJ

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